Koh Yen Bee v American International Assurance Co Ltd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-146 OF 1995
ABDUL MALIK ISHAK J
29 JANUARY 2000

Contract *— Employment contract — Termination — Agency contract — Dismissal under a clause which did not require notice of dismissal — Whether clause valid — Whether clause equitable — Whether company estopped from relying on clause — Contracts Act 1950 ss 158 & 159*

The plaintiff and her husband were engaged as insurance agents for the defendant from 1984. Someone purporting to be from the husband's agency had telephoned a senior officer of the defendant and had verbally abused him. The husband's contract with the defendant was terminated. In January 1995, the plaintiff received a letter terminating her contract with the defendant. No reasons were given. When pressed for a reason for the termination, the defendant sought to rely on cl 26(b) of the agent's contract which provided for termination upon notice and without any reasons having to be given. The plaintiff sued for loss and damage suffered as a result of the defendant's wrongful termination of her contract of agency.

Held, allowing the plaintiff's application:

(1) The conduct and behaviour of the defendant were such that it would be wholly inequitable that the defendant should be permitted to assert the applicability of cl 26(b) of the agent's contract. The court has no hesitation to apply vigorously the doctrine of estoppel by conduct in order to prevent the defendant from resorting to cl 26(b) of the agent's contract (see p 303E–307A);

(2) The statement of agreed facts stipulated, inter alia, the issues of bona fide, mala fide, fairness, justification, equity, natural justice, sufficient cause and reasonable notice. Thus the court could examine and impugn cl 26(b). Since the defendant was the initiator, being the one who had terminated the contract of the plaintiff, it was incumbent upon the defendant that the termination was done in good faith (see pp 307B–308G);

(3) Even if the defendant could rely on cl 26(b), the same had been varied or modified by the addendum to the agent's contract. The defendant must assign a reason for the termination of the plaintiff's agent contract. Since the defendant failed to assign a reason when terminating the plaintiff, there was thus wrongful termination of the plaintiff's agent contract (see pp 308H–310F);

(4) Clause 26(b) of the agent's contract is inconsistent with s 158 of the Contracts Act 1950 ('the Act') which requires sufficient cause for revocation or renunciation of an agency and s 159 of the Act

which specifically mandate the giving of reasonable notice. The defendant must therefore compensate the plaintiff for revocation without sufficient cause and make good the damage resulting to the plaintiff where reasonable notice of revocation or renunciation was not given (see pp 310H–311D);

(5) Unlike other sections in the Act, ss 158 and 159 are not qualified by the words 'in the absence of express contract'. This would suggest that the rights conferred therein are not to be taken away by private contract. At any rate, there is no clause at all in the agent's contract that expressly removes the applicability of both ss 158 and 159 of the Act (see p 311E–F).

[Bahasa Malaysia summary

Plaintif dan suami beliau telah dilantik sebagai ejen-ejen insurans untuk defendan daripada tahun 1984. Seseorang yang dikatakan daripada pejabat ejensi suami beliau telah menelefon seorang pegawai kanan defendan dan telah secara lisan mencacinya. Akibatnya kontrak suami beliau dengan defendan telah ditamatkan. Dalam bulan Januari 1995, plaintif telah menerima sepucuk surat yang menamatkan kontrak beliau dengan defendan. Tiada alasan diberikan. Apabila didesak untuk mendapatkan alasan bagi penamatan tersebut, defendan cuba untuk bergantung pada fasal 26(b) kontrak ejen tersebut yang memperuntukan penamatan setelah notis diberikan dan tanpa perlu untuk memberikan sebarang alasan. Plaintif telah mendakwa untuk mendapatkan gantirugi dan kerugian yang dialami akibat penamatan secara salah kontrak ejensi beliau oleh defendan.

Diputuskan, membenarkan permohonan plaintif:

(1) Perbuatan dan kelakuan defendan sedemikian rupa sehinggakan ia adalah sesungguhnya tidak saksama untuk membenarkan defendan dibenarkan untuk menekankan keterterapan fasal 26(b) kontrak ejen. Mahkamah tidak teragak-agak untuk menerapkan sepenuhnya doktrin estopel melalui perbuatan untuk menghalang defendan daripada bergantung ke atas fasal 26(b) kontrak ejen (lihat ms 303E–307A).

(2) Pernyataan fakta-fakta yang dipersetujui menyatakan, antara lainnya, isu-isu bona fide, mala fide, keadilan, justifikasi, saksama, keadilan asasi, kausa yang memadai dan notis yang sempurna. Oleh itu mahkamah boleh memeriksa dan mencabar fasal 26(b). Oleh kerana defendan merupakan pemula, pihak yang telah menamatkan kontrak plaintif, adalah wajib bagi defendan melakukannnya dengan niat yang baik (lihat ms 307B–308G).

(3) Meskipun jika defendan boleh bergantung pada fasal 26(b), fasal ini telah diubah atau diubahsuai oleh adendum kepada kontrak ejen tersebut. Defendan perlu memberikan satu sebab untuk penamatan kontrak ejen plaintif. Memandangkan defendan gagal

untuk memberikan satu sebab semasa memecatkan plaintif, terdapat dengan itu pemecatan salah terhadap kontrak ejen plaintif (lihat ms 308H–310F).

(4) Fasal 26(b) kontrak ejen adalah tidak konsisten dengan s 158 Akta Kontrak 1950 ('Akta tersebut') yang memerlukan kausa yang mencukupi untuk pembatalan atau penolakan sesuatu ejensi dan s 159 Akta tersebut yang secara khusus memandatkan pemberian satu notis yang munasabah. Defendan oleh itu semestinya memberi pampasan kepada plaintif bagi pembatalan tanpa kausa yang mencukupi dan memberikan gantirugi yang disebabkan kepada plaintif di mana notis pembatalan atau pelepasan yang munasabah tidak diberikan (lihat ms 310H–311D)

(5) Tidak seperti seksyen-seksyen lain dalam Akta Kontrak 1950, ss 158 dan 159 tidak menjadi layak oleh perkataan 'in the absence of express contract'. Ini akan menyarankan bahawa hak yang diberikan di dalamnya tidak seharusnya dinafikan melalui kontrak persendirian. Pada apa kadar, tiada klausa sekalipun dalam kontrak ejen tersebut yang secara langsung menyingkirkan keterterapan kedua-dua ss 158 dan 159 Akta tersebut (lihat ms 311E–F).]

Notes

For cases on termination of employment contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2642–2648.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)
Alexander v Davies & Co (1885) 2 TLR 142 (refd)
Argos, The (1873) LR 5 PC 134 (refd)
Australia, The (1859) Swab 480 (refd)
Barret v Gilmour & Co (1900-01) 17 TLR 292 (refd)
Browne v Dunn (1893) 6 R 67 (refd)
Brown v Symons & Anor [1843-60] All ER 669 (refd)
Burns Philip & Co Ltd v Gillespie Bros Pty Ltd (1947) 74 CLR 148 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (refd)
Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Debenham v Mellon (1880) 5 QBD 394 (refd)
Farquharson Brothers & Co v King & Co [1902] AC 325 (refd)
Farrell v Secretary of State for Defence [1980] 1 WLR 172 (refd)
Firth v Staines [1897] 2 QB 70 (refd)
Goldcorp Exchange Ltd, Re [1995] 1 AVC 74 (refd)

A
Guerin v R [1984] 2 SCR 335 (refd)
Johnson & Anor v Moreton [1978] 3 All ER 37 (refd)
Jolly v Rees (1864) 15 CBNS 628 (refd)
Kandasami v Mohamed Mustafa [1983] 2 MLJ 85 (refd)
Kelly v Cooper [1993] AC 205 (refd)
Kelner v Baxter (1866) LR 2 CP 174 (refd)
B
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233 (refd)
Lam Choon & Co v Lim Yam Hong [1931] SSLR 96 (refd)
Lim Geak Liang v East West UMI Insurance Bhd [1994] 1 AMR 291 (refd)
Liu Wing Ngai t/a Kam Wah Ultrasonic Engineering Co v Lui Kok Wai t/a Almac Machinery [1997] 1 SLR 560 (refd)
C
Lloyd v McMahon [1987] AC 625 (refd)
Lowe v Rutherford Thomson McRae Ltd LR Vol 14 (refd)
Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29 (refd)
Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd; Martin-Baker Aircraft Co Ltd v Murison [1955] 2 All ER 722 (refd)
D
Mohamed Selan v PB Securities Sdn Bhd [1992] 1 MLJ 762 (refd)
Motion v Michaud (1891-92) 8 TLR 447 (refd)
Newsholme Bros v Road Transport & General Insurance Co Ltd [1929] 2 KB 356 (refd)
Notara v Henderson (1872) LR 7 QB 225 (refd)
E
Penerbitan Pelangi Sdn Bhd v Pan Alliance Sdn Bhd and other actions [1999] 4 MLJ 369 (refd)
Phelps, James & Co v Hill [1891] 1 QB 605 (refd)
Phillips v Phillips 4 QBD 139 (refd)
Pichi Muthu, Re [1970] 2 MLJ 143 (refd)
F
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)
Pole v Leask (1860) 28 Beav 562 (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v Lim Kwai Thean [1959] MLJ 179 (refd)
Prager v Blatspiel, Stamp & Heacock Ltd [1924] 1 KB 566 (refd)
G
Realvest Properties Sdn Bhd v The Co-operative Central Bank Bhd Ltd (under receivership) [1996] 2 MLJ 461 (refd)
Saunderson v Griffiths (1826) 5 B & C 909 (refd)
SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31 (refd)
Seagate Technology International v Changi International Airport Services Pte Ltd [1997] 1 SLR 750 (refd)
H
Seaton v Benedict (1828) 5 Bing 28 (refd)
Sinotani Wood Pte Ltd v Rougier Sylvaco International SA [1994] 3 SLR 338 (refd)
Syarikat Jaya v Star Publications (M) Bhd [1990] 1 MLJ 31 (refd)
Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v Mercantile Insurance Sdn Bhd & Anor [1994] 1 CLJ 228 (refd)
I
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)
Toh Kim Lian & Anor v Asia Insurance Co Ltd [1996] 1 MLJ 149 (refd)

Weare v Brimsdown Lead Co Ltd (1910) 103 LT 429 (refd) A
Waghorn v George Wimpey & Co Ltd [1969] 1 WLR 1764 (refd)
Wilson v Tumman (1843) 6 Man & C 236 (refd)
Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713 (refd)

B

Legislation referred to

Contracts Act 1950 ss 155, 158, 159, 183
Evidence Act 1950 s 106
Housing Developers (Control and Licensing) Rules 1970

Ong Chee Yong (*Ong Chee Yong* with him) (*Ong & Ong*) for the plaintiff. C
Firoz Hussein bin Ahmad Jamaluddin (*Dominic Puthucheary* with him) (*Puthucheary Firoz & Asmet*) for the defendant.

Abdul Malik Ishak J: The defendant, an international American corporation by the name of American International Assurance Co Ltd ('AIA'), was in the habit of issuing 120 termination notices every month to D its insurance agents and there was not a single whimper nor protest from any one of them. Every AIA insurance agent seems to be subservient and docile to AIA. It is a classic case of a master flexing its muscle to show its might notwithstanding the innocence of its servant.

Mr Ong Chee Yong, learned counsel for the plaintiff, rightly submitted E that this was a case of an outrageous behaviour of AIA. It was a case, pure and simple, of the big bullying the small; and the strong oppressing the weak. It was an oppression which manifested its ugly head for every one to see. Here was a case of a plaintiff — a Malaysian woman, who toiled for years for AIA, and by her own diligence built up her career to a comfortable level; was acknowledged and honoured by her peers and by AIA; was F earning a handsome salary of RM8,100 per month and who showed every prospect of earning much more in the years ahead yet by a mere stroke of the pen her services were terminated. The signs were too good to be true. In just one fateful day, her whole world came crashing down. In the course of giving her evidence, the plaintiff cried. It was a spontaneous display of an emotional outburst that struck at the chord of one's heart. AIA did not want G her anymore. AIA terminated her services, removed all the privileges and deprived her of her just income. AIA said that they were entitled to do all that without the need to assign a reason at all.

As the evidence unfolded, in the course of the trial, it was surprising that AIA terminated the services of the plaintiff. She was diligent, H conscientious and an effective insurance agent in Johor Bahru. AIA simply terminated her services — showing its true colour: insensitive and blatant disregard to loyalty that was exhibited by the plaintiff. It was the unkindest cut of them all.

The plaintiff was celebrating her Chinese New Year, entering its fourth day when the termination letter came. It was this very letter that was I instrumental in destroying her future. It was this very letter that cruelly took away her livelihood. The letter was dated 26 January 1995 and it was

untimely sent out before the Chinese New Year which began on 31 January 1995. Mr Ong Chee Yong rightly submitted that if not for the fact that the postal authorities were burdened by a deluge of mail, that letter would have reached the plaintiff before the Chinese New Year. The timing was rather bad. It showed cruelty or malice on the part of someone who acted rashly in instructing that letter to be sent out before the Chinese New Year. It must have been the saddest Chinese New Year ever experienced by the plaintiff. The very thought of that letter will surely be with her for the rest of her living days.

The letter dated 26 January 1995 as seen in exhibit P6 was worded thus:

AMERICAN INTERNATIONAL ASSURANCE CO LTD
Wisma AIA,
99, Jalan Ampang
50450 Kuala Lumpur,
Malaysia.
Registered
Date: 26 January 1995
Koh Yen Bee
No 6 Jln Benang Satu
Taman Sentosa
80150 Johor Bahru

Dear Koh Yen Bee

Re: Termination of Agent's Contract

In accordance with cl 26(b) of your Agent's contract signed between you and our Company, we hereby give you fifteen (15) days notice effective from today to terminate the said contract.
You are required to return to us immediately the following:

(1) Agent's Authorization Card.

(2) Application forms, brochures and other sales material and documents supplied to you by our Company.

(3) Conditional Binding Receipt Books.

Yours faithfully

Sgd (Illegible)
LIM BOON KWEE
Manager — Agency Records Department
cc Accounts Department
POS — Renewal Section
Group Department
Special Life Department
JB/SOH
J BHARU OFFICE

and this very letter did not assign nor give the reason for the termination of the plaintiff's position as an insurance agent. It was quite natural that when the plaintiff received this letter, she was interested in knowing the reason for her termination. Any reasonable person similarly placed would have acted likewise. It is axiomatic that for life to be conducted reasonably and

sensibly, people would react sensibly to one another and that there would be reasons for every course of conduct. Using this as a leverage, it was argued by Mr Ong Chee Yong that there must be a reason for the termination. And so the plaintiff through her solicitors by letter dated 10 February 1995 as seen in bundle 'B' at p 8 sought for the reason for the untimely and unwarranted termination and that letter was worded in these words

ONG & ONG
Peguambela & Peguamcara — Advocates & Solicitors

Our ref: OCY/2490/95/SCA

Date: 10 February 1995

American International Assurance Co Ltd
99, Jalan Ampang
50450 Kuala Lumpur

Dear Sirs,

Re: Termination of Agents' Contracts
Soh Chor Ann (1810-35803)
Koh Yen Bee (1810-37142)
Fax: 03-2380550 & by post

We refer to your letter dated 9 February 1995.

With due respect, we do not think cl 26 can be used as a cloak to hide irrational or unjustified decisions in a case such as this where our clients are being victimized and which involves their livelihood. There is a concept called 'Natural Justice' in case you are not aware.

We request you to state the reasons for terminating our clients' contracts. If you fail to do so within seven (7) days we shall take it that you have your own embarrassing reasons for the non-disclosure.

We look forward to hearing from you.

Yours faithfully,

ONG & ONG
OCY/ms
cc clients
Received: Sgd (Illegible). 10/2/95

AIA through its general manager, one RJ Barth, refused to give the reason and this was conveyed by letter dated 17 February 1995 as reflected at p 9 of bundle 'B' and that letter was rather short and curt and it was worded thus:

AMERICAN INTERNATIONAL ASSURANCE CO LTD
Your ref: OCY/SOH
Wisma AIA
99 Jalan Ampang
50450 Kuala Lumpur
BY FAX/POST

February 17, 1995

M/s Ong & Ong
Advocates & Solicitors

No 102, Tingkat 1
Bangunan Kerjasama
Jalan Dhoby
80000 Johore Bahru
Johore

Dear Sirs

Re: Termination of Agents' Contracts
Soh Chor Ann (1810-35803)
Koh Yen Bee (1810-37142)

We refer to your letter of February 10, 1995.

We do not think that it is necessary to add anything further to our letter to you dated 9 February 1995 and reiterate its contents.
Yours faithfully.

Sgd. (Illegible).

RJ BARTH
General Manager
ONG & ONG
Advocates & Solicitors
RECEIVED 22
FEB 1995

Such was the attitude adopted by AIA in its tough stand against the innocent plaintiff. It was as though AIA was saying, rather arrogantly: 'We don't have to tell you why we are doing this. Whatever our reasons are, you have no choice but to accept our decision.' The scope of natural justice has no limit. It extends far and wide to a different and varying factual situation. Lord Bridge of Harwich observed in *Lloyd v McMahon* [1987] AC 625 pp 702–703 to this effect:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates ...

Of crucial importance to this case would be the audi alteram partem rule: the rule requiring fair hearing. It seemed to me that AIA have not heard of this rule requiring fair hearing. Being an international American corporation, AIA threw this rule to the wind. These are germane observations that surfaced in the course of the trial and which will be vigorously applied to the detriment of AIA. The courts are certainly entitled to make and express relevant observations in the context of the facts of the case, facts that cannot escape the attention of the courts.

The issue

AIA relied heavily on cl 26(b) of the agent's contract dated 27 February 1992 to drive home the message that AIA need not give any reason for the termination of the plaintiff's agent's contract. That cl 26(b) of the agent's

contract dated 27 February 1992 can be seen at p 12 to p 21 of bundle 'B' and it was worded as follows:

> 26 Subject to sooner termination of this Agreement by the Company in accordance with Clause 27 hereof this Agreement may be terminated without giving any reason thereof:
> (a) By the withdrawal of the Company from the territory in which the Agent is operating;
> (b) By either party upon 15 days' notice in writing;
> (c) By the death of the Agent.
>
> If this Agreement is terminated by the death of the Agent and provided that no Assignment has been made in accordance with cl 31 hereof, the established new and service commission rights hereunder of the estate of the Agent shall not be affected except that payment made to such estate shall be reduced by the amount of any indebtedness due to the Company.

Mr Firoz Hussein bin Ahmad Jamaluddin, learned counsel for AIA, submitted and he would like the court to believe that there was only one question that required consideration and that was: whether on the true construction of cl 26(b) of the agent's contract dated 27 February 1992, AIA was entitled to terminate the plaintiff's agent's contract without giving any reason whatsoever and upon giving 15 days' notice in writing? The plaintiff had the benefit of legal advice and through her solicitors transmitted a letter to AIA dated 8 February 1995 as seen at p 4 of bundle 'B' and in that letter the plaintiff had, through her solicitors, said that '... the purported termination is entirely without basis, is unreasonable and against all sense of fair play'. AIA was also reminded in the same letter that they did not in their letter of termination dated 26 January 1995 state 'any allegation of misconduct on the part of or cause of complaint against our clients (referring to the plaintiff)'. It was clearly evident that AIA took the uneviable position that the reason and the basis for the termination was not an issue. AIA's reply in writing to the plaintiff's solicitors dated 9 February 1995 at p 7 of bundle 'B' showed clearly AIA's stubborn attitude on the matter and for convenience that letter would now be reproduced hereinunder:

> AMERICAN INTERNATIONAL ASSURANCE CO. LTD
> Your ref: OCY/SOH
> February 9, 1995
> BY FAX/POST
> M/s Ong & Ong
> Advocates & Solicitors
> No 102, Tingkat 1
> Bangunan Kerjasama
> Jalan Dhoby
> 80000 Johore Bahru
> Johore
>
> Dear Sirs
>
> Re: Termination of Agents' Contracts
> Soh Chor Ann (1810-35803)
> Koh Yen Bee (1810-37142)

A We refer to your letter of 8 February 1995. We would point out that each of your abovenamed clients, on 27 February 1992, entered into separate agent's contract with our Company.

Clause 26 of each contract clearly provides that the Agreement may be terminated without giving any reason and cl 26(b) further provides that either party can terminate the contract by giving to the other party 15 days' notice in B writing. We therefore see no basis for your clients to question the termination of their respective contracts.

With regard to your client Soh Chor Ann, by virtue of cl 25(b) of his General Agent's Contract dated 28 January 1994, this Contract terminates automatically when his Agent's Contract terminates and no notice of C termination is required. We are formally recording the automatic termination of Soh Chor Ann's General Agent's Contract when his agent's contract terminates.

Yours faithfully,

Sgd (Illegible)
D RJ BARTH
General Manager
ONG & ONG
Advocates & Solicitors
RECEIVED
15/2/95
E AIA A member Company of the American International Group Inc USA

As alluded to earlier, the plaintiff's reply dated 10 February 1995 was rather simple. It categorically stated that cl 26 could not be used as a cloak to hide irrational or unjustified decisions in a case such as the present where the plaintiff was being victimized and her livelihood was at stake. It was for F these reasons, that the plaintiff implored AIA to state the reasons for terminating the plaintiff's agent's contract. AIA's reply by letter dated 13 February 1995 as reproduced earlier showed a robotic approach to the whole matter. AIA sought to escape liability and urged this court to look in isolation, at only cl 26(b) of the agent's contract dated 27 February 1992 in order to solve the issue at hand and ignoring entirely the conduct of the G parties. Indeed, when Mr Ong Chee Yong sought to tender the memorandum dated 26 January 1995 as an exhibit, Dato' Dominic Puthucheary, learned senior counsel for AIA, rose and vehemently objected to it. The notes of evidence bore witness to it and at p 79 thereof, the following recitals appeared.

H Object, against s 91 of the Evidence Act. Termination need not be with a reason to be advanced. The issue of a reason for the termination is not a question of which the court can examine.

DS Victor Oorjitham took the cue and when he gave evidence for AIA, he testified under cross-examination as follows (see p 108 of the notes of I evidence):

It is a waste of my time to go through the file if the contract says that you can terminate the contract without assigning any reason.

The outburst of Dato' Dominic Puthucheary at the bar and the evidence of DS Victor Oorjitham, the former legal adviser of AIA, were quite outrageous and can never be tolerated. Imagine the following scenario, in the event the assertions by these personalities were accepted: a top-brass executive in AIA can simply and effectively destroy the career of an honest, hardworking insurance agent in many ways. For this exercise, I need to cite a few examples:

(1) by relying on poison-pen letters that defame the character of the insurance agent; or

(2) a hard working lady insurance agent is resistant to the boss's advances; or

(3) the boss dislikes the company which the insurance agent keeps; or

(4) some individual pretends to be the husband of the insurance agent, telephones the boss and takes the liberty to scold the boss with an unrefined equivalent to the word 'illegitimate'.

and the boss will then take the opportunity to dismiss the hardworking insurance agent without assigning any reason thereto. At p 117 of the notes of evidence, DS Victor Oorjitham declared proudly under cross-examination that:

> AIA is 100% owned by the Americans.

and it must be an American policy to dismiss without assigning any reason for it. In the words of DS Oorjitham at p 97 of the notes of evidence:

> It is a business arrangement under the terms of the contract either the agent or the company can give 15 days notice to terminate the business arrangement. This is the standard practice and it has been there for as long as I was in the company — 28 years and even long before that I was an employee and not an agent of the defendant.

Mr Ong Chee Yong rightly submitted that it would be a sad day for justice if AIA can conduct itself so outrageously and yet escape with impunity. To me the injustice would be compounded manifold when the individual at the receiving end, like the present plaintiff, was wholly innocent of any misconduct. The correct legal position would be as follows: that the court, the bastion of justice, should look at the conduct of a party to the action to determine whether it would be inequitable to allow that party to resort to cl 26(b) of the agent's contract.

And now to the law.

The law

Bowstead on Agency (12th Ed) art 2 thereof says that an agency is nothing more than:

> ... the relationship that exists between two persons, one of whom, the principal, expressly or impliedly consents that the other, the agent, similarly consenting, should represent him or act on his behalf.

An agent performs a service for his principal. An agent represents the principal and can acquire rights for his principal. An agent too can subject his principal to liabilities. An agent represents his principal and can create contractual relations between his principal and third parties. The American Restatement of the Law of Agency 1958, defines agency as:

> ... the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act.

Professor Seavey in the 'Rationale of Agency' (1920) 29 Yale LJ 859 at p 868 describes agency as:

> ... a consensual relationship in which one (the agent) holds in trust for and subject to the control of another (the principal) a power to affect certain legal relations of that other.

Thus, essentially the law of agency is therefore concerned with the powers and liabilities of principal and agent. In *Pole v Leask* (1860) 28 Beav 562 at p 574, the court succinctly said:

> The common division of the modes by which agency may be constituted is threefold. It is either by writing or it is by parol, or it is by mere employment.

These are general propositions of law on agency and it must be emphasised that in England there is no corresponding Contracts Act like our Contracts Act 1950.

The rules of agency are subject to the parol evidence rules as embodied in the Evidence Act 1950 (*Realvest Properties Sdn Bhd v The Co-operative Central Bank Ltd (under receivership)* [1996] 2 MLJ 461). To determine the issue of whether or not a person is an agent, one must certainly look at the evidence that has been adduced (*Lam Choon & Co v Lim Yam Hong* [1931] SSLR 96; *Sinotani Wood Pte Ltd v Rougier Sylvaco International SA* [1994] 3 SLR 338; and *Seagate Technology International v Changi International Airport Services Pte Ltd* [1997] 1 SLR 750).

In the context of the doctrine of privity of contract, an agent under an agency agreement is authorized to establish a privity of contract between his employer who is referred to as the principal, and a third party. The agent is the umbilical cord between the principal and the third party. It is said that 'the essential characteristic of an agent is that he is invested with a legal power to alter his principal's legal relations with third parties; the principal is under a correlative liability to have his legal relations altered' (see Reynolds 94 LQR 225). An obligation flows between the principal and the agent under which each party acquires certain rights and liabilities. This kind of relationship between the principal and the agent can be seen in a contract for the sale of goods and in a contract for the hire of a vehicle. A contract that is made with a third party by an agent in the exercise of the agent's authority is enforceable in two ways: by the principal and against the principal. On the authority of *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713, a third party cannot claim against both the principal and the agent. It seems to me that the English doctrine favours the

scenario where the agent may make a contract for his principal and that contract has the same consequences as if the principal has made it himself. Once that happens, the principal plays a major role — acquiring rights and liabilities while the agent fades into the background and ceases to be a party to the contract. In other words, whatever the agent does it is solely for the benefit of the principal and no one else. Thus, an agent employed by an insurance company to solicit business is, beyond doubt, an agent for the insurance company. But there is an authority that says that when the insurance agent helps the insured — the third party, to complete the proposal form, then the agent is said to be acting for the insured. That authority is none other than the case of *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356. If that is the law, then the insured will be liable for misrepresentation or for non-disclosure when the insured tells the agent the truth but the agent records his statement inaccurately on the proposal form. It must be borne in mind that an insured will always regard any communication with the agent as communication with the insurance company after all the agent's commission is always dependent on the proposal being accepted by the insurance company. Fortunately, that is not the law in Malaysia (s 44A of the Insurance Act 1963; *Syarikat Tai Yuen Supermarket (Tawau) Sdn Bhd v Mercantile Insurance Sdn Bhd & Anor* [1994] 1 CLJ 228; *Lim Geak Liang v East West-UMI Insurance Bhd* [1994] 1 AMR 291; and *Toh Kim Lian & Anor v Asia Insurance Co Ltd* [1996] 1 MLJ 149).

In the strict sense of the word, an agent holds the power to affect the legal relations of his principal, after all, agency services are services of a special kind. Lord Browne-Wilkinson in *Kelly v Cooper* [1993] AC 205, pp 213–214 succinctly said that an 'agency is a contract made between principal and agent ..., like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied.' There is a fiduciary relationship between the principal and the agent which in turn gives rise to special duties of a fiduciary nature which each owes the other (*Guerin v R* (1984) 2 SCR 335, 383-385, 394, (1984) 13 DLR (4th) 321 at 339–341, 348–349). It must be stressed that the very idea of a fiduciary obligation arises from equity and it is quite independent of contract. In the words of Lord Mustill in *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 98:

> The essence of a fiduciary obligation is that it creates obligations of a different character from those deriving from the contract itself.

Thus, it can safely be said that an agency is formed in any one of five ways:

(1) by an express appointment;

(2) by the doctrine of estoppel;

(3) by way of ratification of a contract by the principal where the contract is made on his behalf but without his initial authorization;

(4) by necessity; and

(5) by way of cohabitation.

A I will now briefly explain each one of them in order to get a bird's eye view of the interesting subject of agency.

Express appointment

There is no necessity for a formality to be adhered to in the form of a written
B agreement before an agent is being appointed. In *Liu Wing Ngai t/a Kam Wah Ultrasonic Engineering Co v Lui Kok Wai t/a Almac Machinery* [1997] 1 SLR 560, an agency came into existence by way of an oral appointment. Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233 at p 237 observed as follows:

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> Further, Part X of the Contracts Act 1950, which contains the relevant provisions on agency does not contain any requirement that the appointment of an agent or sub-agent has to be in writing or be evidenced in writing. Hence the appointment may be express or implied, that is to say, it may be gathered from the facts and circumstances of a case and from the conduct of the parties.

D

Agency by way of an estoppel

Section 190 of the Contracts Act 1950 contains the principle of agency by way of an estoppel and that section reads as follows:

> When an agent has, without authority, done acts or incurred obligations to
E third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Thus, a principal may be estopped as against a third party from denying that
F a person is or was his agent. Lord Cranworth in *Pole v Leask* (1863) 33 LJ Ch 155 at p 162 remarked:

> It is ... necessary to bear in mind the difference between this agency by estoppel ... and a real agency, however constituted.

In the absence of a written agreement as to authority or in the absence of
G subsequent ratification of unauthorized acts, an agency by estoppel may arise 'by placing another in a situation in which .... according to the ordinary usage of mankind that other is understood to represent and act for the person who has placed him so' (per Lord Cranworth in *Pole v Leask* (1863) 8 LT 645 at p 648). In short, a person who by words or conduct has allowed
H another to appear to the outside world to be his agent, so that third parties can deal with him then that person cannot afterwards repudiate this apparent agency as it would cause injury to third parties. That person is treated as though he in fact had authorized the agent to act in the way he has done. According to Lord Lindley in *Farquharson Brothers & Co v King & Co* [1902] AC 325 at p 341:

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> The 'holding out' must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it.

Ratification

It simply means this: whatever the agent does on behalf of the principal is done at the time when the relation of principal and agent is not in existence. The agent has no authority to do what he does at the time he does it. Subsequently, the principal on whose behalf, though without whose authority the agent has acted, accepts the agent's act and adopts it just as if the agent had acted with the prior authorization of the principal. Of pertinence to note is that the ratification of the principal does not merely give validity to the agent's unauthorized act as from the date of the ratification, but it is backdated so as to take effect from the time the agent has acted. Tindal CJ described ratification in *Wilson v Tumman* (1843) 6 Man & C 236 at p 242 in these words:

> That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established principle of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same effect as by, and with all the consequences which follow from the same act done by his previous authority.

Three conditions must be satisfied before a valid ratification is constituted. Firstly, the agent must have purported to act for the principal. Secondly, the agent must have a competent principal at the time the act was done. Thirdly, the principal must be legally capable of doing the act himself at the time of the ratification. Willes J said in *Kelner v Baxter* (1866) LR 2 CP 174 at p 184:

> Ratification can only be ... by a person in existence either actually or in contemplation of law.

Basically, there must be a competent principal. In the words of Wright J in *Firth v Staines* (1897) 2 QB 70 at p 75: 'At the time the act was done, the agent must have had a competent principal.' In other words, the principal must be qualified in law to act in the way he did. Thus, infants, mentally incompetent and other incapacitated persons have no authority to ratify the acts purportedly done for them by the agents. The agent too must contract as an agent for a definite, ascertained, identified or identifiable principal who can later ratify the act done by the agent (*Saunderson v Griffiths* (1826) 5 B&C 909 at p 915).

By necessity

On the ground of necessity, a person may be bound by a contract made by another on his behalf but without his authority. A good example would be in an admiralty matter. Thus, a master of a ship is entitled, in cases of accident and emergency, to enter into a contract which will bind the owners of the cargo even though it exceeds his express authority provided it is made in the best interest of the owners in question (*The Argos* (1873) LR 5 PC 134; and *Notara v Henderson* (1872) LR 7 QB 225). It must be borne in mind that the action taken must be necessary (*Prager v Blatspiel, Stamp & Heacock Ltd* (1924) 1 KB 566, 571-572; The Australia (1859) Swab 480;

and *Phelps, James & Co v Hill* (1891) 1 QB 605) and solely for the benefit of the principal (*Burns, Philip & Co Ltd v Gillespie Bros Pty Ltd* (1947) 74 CLR 148).

The doctrine of agency of necessity justifies a person in taking an action for the benefit of another in an emergency where the property or interests of that other are said to be in imminent jeopardy and it thus becomes necessary, in order to preserve the status quo, to act accordingly.

By way of cohabitation

There is a presumption that a wife is entitled to pledge the credit of her husband with whom she is staying with for necessaries which are suitable to his style of living. In the words of Thesiger LJ in *Debenham v Mellon* (1880) 5 QBD 394 at p 402:

> There is a presumption that she has such authority in the sense that a tradesman supplying her with necessaries upon her husband's credit and suing him, makes out a prima facie case against him, upon proof of that fact and of the cohabitation. But this is a mere presumption of fact founded upon the supposition that wives cohabiting with their husbands ordinarily have authority to manage in their own way certain departments of the household expenditure, and to pledge their husbands' credit in respect of matters coming within those departments.

and this presumption equally applies to a woman who lives with a man as his mistress. Necessaries would include a lot of things, such as clothing, household equipment, food, medicine and the hiring of servants. The list would be endless. Like all presumptions, this kind of presumption is rebuttable. It is rebuttable if the husband can prove that he has warned the merchant not to supply goods on credit (*Seaton v Benedict* (1828) 5 Bing 28) or that the husband has expressly forbidden the wife to pledge his credit (*Jolly v Rees* (1864) 15 CBNS 628).

The arguments

Mr Firoz Hussein bin Ahmad Jamaluddin submitted that the agent's contract was revocable and he cited an interesting authority where the facts were distinguishable and certainly poles apart from the present case. In *Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd; Martin-Baker Aircraft Co Ltd v Murison* [1955] 2 All ER 722, McNair J had to consider whether or not the plaintiffs were entitled to the declarations for which they ask as to their rights under two contracts between them and the defendants which were still running. The plaintiffs applied to the court for declaratory judgments as to their right to determine these two agreements in the hope that the decision of the court on those questions may enable them to be guided as to their future course of action. McNair J considered whether those agreements, or either of them, were determinable by reasonable notice, as was contended by the plaintiffs, or whether, as the defendants contended, the agreements were in their nature permanent, or perhaps the agreements were determinable by mutual consent. At p 732 to p 733 of the report, McNair J had this to say:

> Accordingly it appears to me that I have to approach the determination of this question without any presumption in favour of permanence; and, indeed, if there is any presumption at all, it would seem to me to be a presumption the other way. It is to be borne in mind that this agreement is an agreement in a commercial or mercantile field. No case was cited to me where it has been held that this doctrine of irrevocability applies to a contract in the commercial or mercantile field, and I do not feel that the law merchant would normally look at such an agreement as this as being an agreement intended to constitute permanent relationships. For example, I have little doubt that the law merchant would regard a contract for the sale of a hundred tons of coal monthly at a fixed price, no period being specified, as a contract determinable on reasonable notice. The common law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties have made, on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently found their place in the great condifying statutes of the Sale of Goods Act 1893, the Marine Insurance Act 1906, and the Bills of Exchange Act 1882, where this view of the law merchant has been adopted and a provision has been inserted to the effect that, where the contract makes no provision for fixing either price, or premium,or time, at which an act has to be performed, then the law is that a reasonable price, or reasonable premium, or reasonable time, will be implied.
>
> It is, of course, quite true that this kind of consideration can in many cases be excluded by express provision; but, where the contract leaves the matter open, I think that the common law approach would be to provide a solution which is reasonable. At the same time I bear in mind that it is not the function of the court to make a reasonable contract between the parties, and, in so far as the matter is one of implying terms, one can only imply terms which are reasonable to give business efficacy to the contract.

At the same page of the same judgment, McNair J continued to say:

> To my mind, however, the question whether a contract such as this is permanent or revocable does not depend on the insertion of an implied term, but depends on the true construction of the language used. This is certainly the view expressed by Lord MacDermott in *Winter Garden Theatre* [1947] 2 All ER 331. Accordingly, subject to there being anything in the agreements of 26 August 1951, and 9 March 1954, which is inconsistent with their being revocable, I would favour the view that they are revocable.

An argument was advanced using *Martin-Baker Aircraft Co Ltd & Anor v Canadian Flight Equipment Ltd* as a leverage to the effect that the presence of a clause providing for termination of an agency contract for specific reasons could not be read to mean that the contract could not be terminated by giving reasonable notice. But one must not forget that under s 158 of the Contracts Act 1950 compensation must be made for revocation by principal or renunciation by an agent for any previous revocation or renunciation of the agency without sufficient cause. Then there is s 159 of the Contracts Act 1950 which enacts that reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. In

my considered view both ss 158 and 159 of the Contracts Act 1950 must be read conjunctively with the result that both sufficient cause and reasonable notice are required for the lawful termination of an agency contract.

Next, it was argued that the agent's contract contained an express termination clause and the defendant may invoke that clause to validly and lawfully terminate the agent's contract. For this proposition, an array of authorities were cited. For a start, reference was made to a passage appearing in a textbook entitled the *Law of Contract* written by Andrew Phang Boon Leong where at p 841 the learned author said:

> The agent has agreed to serve the principal; the principal has agreed to accept and to pay for that service. It is clear, therefore, that any unilateral termination of the relationship by either party will be wrongful unless it is in accordance with the contract. If there is an express term dealing with the matter, cadit quaestio. If not, all depends upon the construction of the contract. In the case of every contract, whether it is one of agency or not, the common intention of the parties with regard to the power of termination must be ascertained in the light of all the admissible evidence.

This would be followed by a passage of a book entitled *The Law of Contract* written by GH Treitel where at p 561 the learned author had this to say:

> An agent's authority can be determined by giving him notice: for instance, a wife's implied authority to pledge her husband's credit for necessary household expenses can be terminated in this way. Where the agency is contractual it may be for a fixed term or specify a period of notice. If no term or period of notice is specified, the contract is determinable on reasonable notice. A notice given in breach of contract is, in general, nonetheless effective. It determines the agent's authority and the relationship of principal and agent.

Then there was a case known as *Lowe v Rutherford; Thompson; McRae Ltd* LR Vol 14 (3rd Series) at p 772 where the headnote reads as follows:

> The relationship of a real estate broker and agents employed by him to sell listed properties is such that in the absence of some contractual or customary term to the contrary, the employment is terminable by either party at will, summarily, with or without cause.

and that was a case where the plaintiff sued the defendant for damages for alleged wrongful dismissal and alternatively on a quantum meruit for services rendered. The agreement between the parties was not embodied in any written contract. It was for an indefinite period of time and subject to the normal conditions of employment existing in British Columbia as between real estate agents and their salesmen. In the present case there was in existence the agent's contract which was in writing, and this was the marked difference between the present case and that of *Lowe*.

Reference was also made to the case of *Alexander v Davies & Co* (1885) 2 TLR 142. That was a case of wrongful dismissal and the recovery of commissions due to the plaintiff. The plaintiff claimed as a traveller, but it appeared that the plaintiff was a commission agent, having agreed in writing with the defendants in 1879 'to call on shippers and circulate their catalogue

from time to time', and the defendants gave the plaintiff 2½% on all orders taken by the plaintiff which the defendants should execute. The plaintiff continued to act under this agreement until February 1884, when inconsequence of certain differences respecting his relations with another firm, the defendants wrote that they were unable to retain the plaintiff in their employ any longer and gave the plaintiff a formal one week's notice. It was contended by the plaintiff that he was entitled by custom to six months' notice, or in the alternative to a reasonable notice. The plaintiff took the stand and gave evidence that it was the recognized custom in London for a traveller, employed as the plaintiff was, to have six months' notice. In support of this, two or three witnesses were called, but, except that one of them had on one occasion received six months' notice, they were unable to give specific instances where the custom had been observed. On the other hand, a large number of witnesses were called for the defence who denied that any such custom existed, and said that the employment of a commission agent such as the plaintiff could be terminated on either side at any moment without notice. The jury after an hour's deliberation, returned a verdict for the defendants. Clearly therefore, the case of *Alexander* was a case that was decided by a jury who merely relied on and acted upon the directions by the court.

This was followed by the case of *Brown v Symons & Anor* [1843-60] All ER Rep 669. That was a case where the plaintiff was employed by the defendants as a commercial traveller under a written agreement which stipulated that the agreement was to be binding between the parties 'for twelve months certain from the date hereof and to continue from time to time until three months' notice in writing be given by either party to determine the same'. After the agreement had been in force for nine months the defendants gave the plaintiff three months' notice to determine his employment at the expiration of twelve months from the date of the agreement. In an action for wrongful dismissal the plaintiff contended that the agreement was not determinable at the expiration of the first year. It was held that the agreement was for one year certain and did not bind the parties for a longer term, and therefore, the defendants were entitled to give three months' notice expiring at the end of the first year of employment. On 23 April 1860, the judges of the Court of Common Pleas wrote short judgments in the following terms:

> Erle CJ — I am of opinion that the construction the court should put on the agreement is in favour of the defendant. It seems to me that the agreement was that the plaintiff should serve the defendant for a term of twelve months certain, and as it stands it does not bind the parties for a longer time.
>
> Willes and Byles JJ, concurred.
>
> Keating J — I have some doubts owing to the words 'and to continue,' but after *Thompson v Maberly* (1811), 2 Camp 573, NP; 31 Digest (Repl) 485, 6113, I do not feel that my doubts are sufficiently strong to make me differ from the rest of the court.

The next case would be *Motion v Michaud* (1891-92) 8 TLR 447, which came up for hearing before Day J and a special jury. Mr Justice Day, in delivering judgment, had this to say:

A that there was no evidence of anything in the nature of service or of a contract only determinable by notice. The plaintiff was an independent merchant who sold wines for his own profit, and also sold champagne and beer for other people upon commission, and he undertook to see what he could do in the way of selling the defendants' brandies upon similar terms. He was in no sense their servant, and was not bound to devote any time or energy to the business B on their behalf. No action in the nature of wrongful dismissal was maintainable in respect of such a relation. His judgment must therefore be for the defendants upon the claim, and also upon the counter-claim, the amount to be agreed between the parties.

In *Barret v Gilmour & Co* (1900-1901) 17 TLR 292, the facts were as follows. The defendants, who were wholesale merchants, employed the C plaintiff as their traveller or representative in certain towns to obtain orders for their goods, and the plaintiff to receive commissions on all businesses done. The contract contained no provision as to terminating the employment. The defendants gave notice to terminate the employment and it was held that upon the evidence as to the practice of the trade, the D employment could be terminated by notice, and the plaintiff was not entitled to commission on orders received after he left the defendants' employment from customers introduced by him during his employment. Mr Justice Phillimore gave judgment for the defendants, holding that the evidence clearly established that the plaintiff's engagement could be terminated by notice, and that the notice given by the defendants was E sufficient, and that the plaintiff was not entitled to be paid any further commission.

In *Weare v Brimsdown Lead Co Ltd* (1910) 103 LTR 429, the court there had to deal with the right of an agent to commission on indirect sales after the termination of the plaintiff's employment. The evidence showed F that the plaintiff became the agent of the defendants for the sale of lead manufactured by them upon the terms that he was to receive a commission of $2^1/_2$% upon all sales, direct or indirect, effected to customers introduced by him. After the termination of the plaintiff's employment, the plaintiff brought an action to recover commission alleged to be due to him upon further orders given by the customers originally introduced by him whilst in G the defendants' service. The court held that the plaintiff was not entitled to such commission. Avory J at pp 429–430 of the report had this to say:

> I think the question in this case is simply whether the parties contracted either that the plaintiff should be employed for all time or that he should be paid commission after he had left the defendants' service on orders given by H customers previously introduced by him. The authorities which have been cited may all be reconciled in this way; in some of them the court has construed the contract as implying a term that the plaintiff is to be employed for all time, or as implying a term that the plaintiff is to be paid commission after he has left his service. Applying that test to this case, I can find nothing in the terms of this contract importing either that the plaintiff was to be employed for all time or that he was to be paid commission on orders given by I customers after he had left the defendants' service. Mr Cassels has very properly said at the conclusion of his argument that the whole point turns on the meaning of the word 'indirect' in this contract. He relies upon that word

> as importing that if the plaintiff has left the defendants' service he is still to be entitled to commission on the orders given by customers introduced by him whilst in his employment. If he could have satisfied us that there was no other meaning to be given to the word 'indirect', I think there would have been a great deal to be said for his argument, and that was why I asked him if the word could be construed to mean that the plaintiff was to receive commission on such orders whilst he remained in the service of the defendants. He admitted that that was a reasonable construction to place upon the contract, and therefore I think it cannot be construed as implying that he was to have commission on orders received after he had left the defendants' service. I am therefore of opinion that this appeal must be dismissed.

In a concurring judgment, Phillimore J said at p 430 of the report:

> I am of the same opinion for the same reasons.

The case of *Mohamed Selan v PB Securities Sdn Bhd* [1992] 1 MLJ 762 was referred to and that was a case, so submitted Mr Firoz Hussein bin Ahmad Jamaluddin, where the termination of an agency contract had been carried out pursuant to an express termination clause which required no reasons to be assigned for such termination, and no reasons were given at the time of termination and such termination was said to be lawful. A proper appraisal of *Mohamed Selan*'s case showed that that case dealt with the suspension of an agent and not in regard to the agent's termination. That being the case ss 158–159 of the Contracts Act 1950 which dealt with renunciation or revocation of an agency were not and could not be considered by that court.

It was ingeniously argued on the strength of *Mohamed Selan*'s case that the right to terminate without assigning any reason was lost when a party offered a reason for the termination but qualified it by saying that the reason offered must be one which was advanced at the point of termination and not subsequently. I must say that AIA was not denying that there was a reason for the termination and this reason existed prior to the termination of the agent's contract. The sole reason was the fact that the plaintiff was (and still is) married to Soh Chor Ann and nothing else. The pertinent question to ask in the context of *Mohamed Selan*'s case would be whether AIA had given a reason for the termination of the plaintiff's agent's contract. It was immaterial whether the reason was given in the termination letter or revealed in open court during cross-examination. Once the secret was out, the court cannot be prevented from scrutinising it and give whatever weight to it as the justice of the case demanded it.

It was submitted that the termination of the contract by giving four months' notice was upheld in the case of *Penerbitan Pelangi Sdn Bhd v Pan Alliance Sdn Bhd and other actions* [1999] 4 MLJ 369 even though the breach of contract was not established. Factually, *Pelangi Sdn Bhd*'s case can be distinguished. That was a case which dealt with a commercial contract that was entered between two business enterprises at arm's length and under those circumstances it was not surprising that the termination of the distribution agreement by giving four months' notice as stipulated in the agreement was upheld.

A Going on an uphill task, a submission was made for AIA to the effect that upon termination of the agent's contract, all claims for future commissions pleaded at para 12 of the statement of claim must necessarily fail as the parties have pre-agreed that such sums were not recoverable. The right approach would be to ask the following pertinent question: whether the termination of the agent's contract was lawful or not? AIA's submission B would only be plausible if the termination was lawful. In the context of the present case, AIA have wronged the plaintiff by unlawfully terminating the agent's contract and as such AIA cannot be permitted to benefit from their wrongdoing by merely asserting that the plaintiff was not entitled to any claim for future commissions. The hard cold truthful fact was that by AIA's C wrongful termination of the agent's contract, the plaintiff had lost her earnings and whether or not those earnings comprised of commission, bonus, benefits or other payments did not matter. Basically, the plaintiff's claim was for her loss resulting from AIA's unlawful termination of the agent's contract. At this juncture reference to the case of *Syarikat Jaya v Star Publications (M) Bhd* [1990] 1 MLJ 31 would be ideal. In that case, D Edgar Joseph Jr J (as he then was) said that (see p 35 of the report):

> In actions such as the present one, it is clear law that the normal measure of damages will be the amount that the agent might reasonably have earned under the contract had he not been prevented from continuing to act.

and the present plaintiff would certainly have continued earning for the rest E of her working life had it not been for that untimely termination. Thus, the measure of compensatory damages should therefore be what she might reasonably have earned as an insurance agent had AIA not prevented her from continuing to so act.

AIA relied on *Popular Industries Limited v Eastern Garment* F *Manufacturing Sdn Bhd* [1989] 3 MLJ 360 to drive home the message that the plaintiff had failed to discharge the burden of proving the fact and the amount of damages. A perusal of the notes of evidence showed that there was an undisputed evidence of the income of the plaintiff at the time of the termination and the uncontroverted evidence that she was deprived of her income after the termination. In short, there was evidence both of the fact G of damage and the amount of damages thereby fulfilling the twin requirements of *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd*. I have more to say about the quantum of damages in the later part of this judgment.

AIA seeking to justify its conduct

H

I will now endeavour to examine the evidence of AIA through its witnesses.

Yee Ah Yin @ Yun Yin Siong (SD1) — 'Yee'

In regard to the grounds of termination of the plaintiff's agent's contract, I the conflicting positions taken by Yee left much to be desired.

Initially Yee was very confident when he took the stand and he categorically said that he was familiar with the agent's contract particularly

in relation to the facts of the present case (see p 67 of the notes of evidence). Yet as the trial progressed, Yee changed his mind and ended up by having to admit that he was not familiar with the legal ramifications of the agent's contract (see p 70 of the notes of evidence) and that he was also not familiar with the facts of the present case. Yee held steadfastly to the notion that he did not know the reason for the termination of the plaintiff's agent's contract (see p 71 of the notes of evidence) but somehow he admitted the following:

(a) that he did not know whether the management had made a mistake in terminating the plaintiff's agent's contract (see p 71 of the notes of evidence);

(b) that he did not know whether the plaintiff's agent's contract was terminated pursuant to the addendum (see exh P4);

(c) that there was a letter to terminate Soh Chor Ann's contract but there was no separate letter to terminate the plaintiff's agent's contract (see p 80 of the notes of evidence); and

(d) that the plaintiff was not given a chance to show cause as to why her agent's contract should not be terminated (see p 80 of the notes of evidence).

At the end of the day, Yee had to admit that the plaintiff was terminated just because she is Soh Chor Ann's wife (see p 81 of the notes of evidence). The averment of AIA in para 11 of the Amended Statement of Defence at D10 that 'they are under no obligation to reinstate the plaintiff or give any reason for the termination' finally slipped out from Yee's lips during cross-examination by Mr Ong Chee Yong. Yee's performance in the witness box left much to be desired.

DS Victor Oorjitham (SD2)

Now, the truth of the matter in regard as to why the plaintiff's agent's contract was terminated once again emerged during the cross-examination of this witness. This witness did say that no reason need be given in all questions of termination under cl 26 of the agent's contract, but, alas, the truth finally prevailed. Under cross-examination, the evidence went like this (see p 109 of the notes of evidence):

> Question: In the present case the plaintiff's agency contract was terminated for the sole reason of her being the wife of Soh Chor Ann?
>
> Answer: Yes, and I have explained the policy of the company.

It was therefore crystal clear that there was indeed a reason for the termination of the plaintiff's agent's contract. As the evidence unfolded from the lips of AIA's own witnesses there was indeed a reason for the termination of the plaintiff's agent's contract. The plaintiff was made a scapegoat, a victim of AIA's inhumane conduct of terminating her agent's contract just because she is the wife of Soh Chor Ann. She was made to suffer for no other reason than this.

DS Victor Oorjitham gave evidence of the alleged policy or guidelines of AIA, namely, that where both the husband and wife hold separate agent's

contracts with AIA, then when the husband's contract is terminated the wife's agent's contract is also said to be terminated (see p 98 of the notes of evidence). DS Victor Oorjitham sought to justify this policy by advancing two reasons:

(1) That the husband always get the wife to take out an agent's contract. The wife doesn't do any business. The husband is the active agent and he puts the policies under the wife's agent's contract (see p 99 of the notes of evidence).

(2) That AIA does not want either spouse to have anything further to do with the business of AIA. If the plaintiff's contract was not terminated, the husband can create a lot of dissension within AIA because his own contract has been terminated (see p 99 of the notes of evidence).

The two reasons advanced by DS Victor Oorjitham were highly suspect. No statistical evidence was produced to support his assertions. In my judgment, the so called rationale articulated by DS Victor Oorjitham in regard to the alleged policy or guidelines of AIA was wholly speculative and devoid of merit. It was riddled with assumptions. There were so many question marks to the evidence of this witness. He had no knowledge of the character of the plaintiff. He did not know that the plaintiff was a very successful insurance agent. He was obviously unaware that the plaintiff had been very active as an insurance agent even before her husband, Soh Chor Ann, became one. The suggestions by this witness that the wife was inactive while the husband would be the active individual cannot be supported by the available evidence. All the evidence demonstrated that it was the plaintiff — the wife, who was also active and who was the one who unselfishly worked to promote her husband's career. The notes of evidence carried the following germane recitals at p 12 thereof:

> Between 1984 to 1992 there would be eight years of service with AIA but the certificate at p 28 of bundle 'B' shows 5 years because during 1984 and 1987 I assigned all my cases to my husband so that he would be promoted as supervisor. My husband obtained all the credits for my work. I am still married to the same man:
>
> > 'After transferring all my cases to my husband, I actually started in 1987 at level zero.'

I cannot help but observe that the assertions by DS Victor Oorjitham that the wife does not do any business and that 'the husband is the active agent', appears to be wholly gratuitous and it smacks of an unabashed effort to assist his former employer — AIA, at all costs. The assertions by DS Victor Oorjitham that if the wife agent's contract was allowed to continue, then the husband can create a lot of dissension within the company, were entirely speculative and without any basis whatsoever. These were assertions calculated to undermine the intelligence of the court. The truth of the matter would be this: that with the husband's income being at level zero, there was every incentive for the plaintiff, if her agency had not been terminated, to have remained with AIA and to work even harder for the family. This would be the scenario that the plaintiff would have painted. Since her husband's career with AIA had been rudely destroyed by the

stroke of the pen, it was now left entirely to the plaintiff to be the provider of the family. Viewed in its correct perspective, DS Victor Oorjitham's evidence on those assertions were clearly an affront to the plaintiff's dignity and integrity. I take judicial notice that Malaysians are generally hard working and the plaintiff was not an exception. She would have excelled better had her agent's contract remained intact. AIA in their haste to terminate the agent's contract of Soh Chor Ann had simply bulldozed through and terminated the plaintiff's agent's contract for a flimsy reason — that the plaintiff was the wife of Soh Chor An. How shallow can AIA be in their thinking and approach?

The evidence showed that Soh Chor Ann did not go to any other insurance company after his termination. He was too devastated. He left the insurance industry altogether. The plaintiff too was demoralized by the whole unhappy episode. She refused to work and remained as a plain housewife. In my considered view, DS Victor Oorjitham's evidence on the existence of an alleged policy or guideline as alluded to earlier was rather flimsy and was of little weight at all for the following reasons.

At no time did AIA's counsel put to the plaintiff or to Soh Chor Ann that there was such a policy or guideline of AIA. By not raising this matter during the plaintiff's case, AIA had precluded the plaintiff and her husband — Soh Chor Ann, from saying anything about the alleged policy or guideline. To me, the so called policy or guideline was crucial to AIA's case because it gave an explanation as to why the plaintiff's agent's contract was terminated and therefore it ought to have been put at the earliest possible moment and not sprung as a surprise for the very first time during the defence case (*Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346; *Re Pichi Muthu* [1970] 2 MLJ 143; *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *Browne v Dunn* (1893) 6 R 67; and *AEG Carapiet v AY Derderian* AIR (1961) Cal 359). It was a perfect outrage on the part of AIA in not putting across its case to the plaintiff or to the plaintiff's husband. It was apparent that when DS Victor Oorjitham took the stand it was a mere attempt to give some semblance of reason to AIA's hasty and irrational action of terminating the plaintiff's agent's contract. It was an exercise of ex post facto reasoning — an attempt to be wise after the fact.

I must make this germane observation: there was scant evidence of the existence of the so called policy or guideline at the material time. It must be emphasized that there was nothing in writing to prove the existence or even to suggest the existence of the so called policy or guideline. If there was such a policy or guideline in written form, AIA — the wholly owned company of the Americans, would surely have produced the same in the course of the trial. It was extremely hard to believe that if there was such a guideline or policy, it would not be put in writing.

AIA must be estopped by their conduct from relying upon cl 26(b) of the agent's contract

Gopal Sri Ram JCA in *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206 (CA) explained the law in these words (see p 216 of the report):

> First, the law. We take as settled beyond argument that estoppel is a flexible doctrine by which justice is done according to the facts of a particular case. It is, therefore, erroneous to apply the doctrine to the facts of a case as though it were some form of legal straitjacket.
>
> Although decided cases speak of some of the features of the doctrine, such as a declaration or a representation and an inducement, these are but statements made in the context of the facts and circumstances of the particular case in which they appear. At the end of the day, the court has to answer the question: is it just that this particular litigant should, in the light of his conduct, succeed in the action given the peculiar facts of the case? If the answer to that question is in the affirmative, then the doctrine does not apply; if it is in the negative, then it does.

and the germane question to pose in the present case would be: 'Is it just that AIA should, in the light of its conduct, succeed in the action given the peculiar facts of the case? The answer would certainly be in the negative and the doctrine of estoppel would be vigorously applied in favour of the plaintiff.

If it was argued that estoppel can only be used as a shield and not as a sword, the answer can be found in the speech of Gopal Sri Ram JCA in the case of *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 especially at p 707 where his Lordship said:

> We would add that it is wrong to apply the maxim 'estoppel may be used as shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:
>
> > 'Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.'

Having perused through the evidence with a toothcomb, I have no hesitation to hold that the circumstances of the conduct and behaviour of AIA were such that it would be wholly inequitable that AIA should be permitted to assert the applicability of cl 26(b) of the agent's contract dated 27 February 1992. This was part and parcel of my judgment and I so hold accordingly.

I will now examine in some detail the relevant conduct and behaviour of the parties:

(1) The plaintiff was an outstanding life insurance agent. She was a life insurance counsellor (see p 32 of bundle marked 'B'), a recipient of the Certificate of Outstanding Achievement (see p 26 of bundle marked 'B'), a recipient of the National Quality Award for the year 1990 for achieving more than 90.4% persistency (see p 36 of bundle marked 'B'), a member of the Million Dollar Club for several years (see p 25 of bundle marked 'B'), and one of the top 5 AIA agents in Johor Bahru when her contract was terminated (see p 47 of bundle

marked 'B'). The evidence as unfolded showed that the plaintiff had not done anything at all to bring AIA into disrepute yet she had her position as an insurance agent abruptly terminated. A

(2) There was no intimation, warning or sign of discontentment on the part of AIA as to the plaintiff's performance or character prior to sending out the letter of termination dated 26 January 1992. B

(3) The plaintiff's husband, Soh Chor Ann, who also had his agent's contract terminated, had done all that he could reasonably be expected to do, in the circumstances, to resolve the twin problem of his termination and that of his wife. Soh Chor Ann spoke to RJ Barth, the then General Manager of AIA in Malaysia, over the telephone on two occasions, both on 3 February 1995; met RJ Barth, a white American, personally on two occasions in Kuala Lumpur, namely on 15 February 1995 and 1 March 1995; attempted to talk to Lee Chin Leong, the Director of Agency of AIA in Malaysia, on several occasions, namely on 3 February 1995 and 15, 1995 February wrote an appeal letter to Lee Chin Leong dated 4 February 1995 as seen at p 3 of bundle marked 'B'; contacted the officials of Life Underwriter Sales Executive Board ('LUSEB') on 15 February 1995 and 16 February 1995 respectively; instructed his solicitors to withhold legal proceedings pending attempts by him to settle the matter amicably on 17 February 1995; attended LUSEB's meeting in Genting Highlands and addressing the LUSEB committee on 19 February 1995; wrote the letter of apology dated 20 February 1995, although he and his wife did not do anything wrong and that letter can be seen at p 11 of bundle marked 'B'; contacted Tony Chan to find out about the outcome of LUSEB's mediation efforts; contacted one AIA official after another in desperation — Lee Chin Leong, then Edmund Ng, then Leong Tuck Fai in order to find out whether his and his wife contracts would be reinstated; spoke to RJ Barth once again on 11 May 1995 for about half an hour and pleaded with him, but to no avail, to reinstate the contracts. RJ Barth acted in an unbecoming manner for an American official of AIA. C D E F

(4) The plaintiff's husband, Soh Chor Ann, had repeatedly told RJ Barth on 3 February 1995, 15 February 1995 and 11 May 1995 that it was not him that made the offending telephone call, this was the telephone call where RJ Barth was called a 'bastard'. G

(5) The plaintiff's husband, Soh Chor Ann, lodged a police report as early as 10 February 1995 as seen at p 6 of bundle marked 'B' in regard to the telephone call wherein RJ Barth was scolded as a 'bastard' and in that police report Soh Chor Ann categorically said that it was not him who had made that telephone call. H

(6) To date neither the plaintiff nor her husband — Soh Chor Ann, knew the reason why their agent's contracts were terminated but Soh Chor Ann suspected that it was because someone who claimed to be from his agency, JB Soh, had called up RJ Barth and scolded him a 'bastard'. The evidence thus far unfolded showed that the plaintiff's I

A agent's contract was terminated simply because she is the wife of Soh Chor Ann and the latter's contract was terminated simply because he is the manager of JB — Soh.

(7) As early as 9 February 1995, AIA had refused to disclose the reason as to why the plaintiff's agent's contract was terminated (see p 7 and p 9 of bundle marked 'B', and para 8 of the Statement of Agreed Facts as seen in bundle marked 'C'). It was only during cross-examination of Yee that the embarrassing truth slipped out slowly but surely. Given the embarrassing reason, it was not surprising that AIA attempted to hide the reason for that untimely termination.

(8) The evidence as unfolded told a sorry state of affairs in AIA. Certain top officials in AIA were attempting to avoid responsibility for what had befallen the plaintiff and her innocent husband. RJ Barth had the audacity to say on 3 February 1995 that he had 'washed his hands off the case' (see p 52 of the notes of evidence) and he told Soh Chor Ann to speak to Lee Chin Leong instead. After LUSEB's mediation that miserably failed — the power of the Americans were all encompassing, Soh Chor Ann spoke to RJ Barth and he in turn told Soh Chor Ann to speak to Lee Chin Leong. The latter in turn told Soh Chor Ann to speak to Edmund Ng and who also told Soh Chor Ann to speak to Leong Tuck Fai. It was a case of a merry-go-round. Eventually, Leong Tuck Fai told Soh Chor Ann that AIA may not reinstate him and his wife's contracts and this was followed by a suggestion that Soh Chor Ann should speak to RJ Barth personally. When Soh Chor Ann spoke to RJ Barth for the last time on 11 May 1995 and told him that Leong Tuck Fai had told him that RJ Barth had 'jumped up on receiving the phone call and that caller addressed him as a bastard' (see p 60 of the notes of evidence), RJ Barth then made the exculpatory statement to the effect that 'people are very good at pointing accusing fingers at one another when things crop up' (see p 60 of the notes of evidence). From the available evidence, the irresistible conclusion was that AIA or its servants had been acting in a less than forthright manner with Soh Chor Ann and the innocent plaintiff. It was AIA that terminated the agent's contracts of both the plaintiff and her husband, yet they chose not to own up to the wrongness of their action. Instead AIA chose to utilize cl 26(b) of the agent's contract dated 27 February 1992 as a cloak for their misdeeds.

(9) As I said, the truth of the matter was that the plaintiff's agent's contract was terminated because she is the spouse of Soh Chor Ann. This was followed by a calculated attempt to explain that such a termination was perfectly acceptable by DS Victor Oorjitham.

It was beyond dispute that the plaintiff was a sheer innocent victim of AIA's haughtiness. It was wholly inequitable to permit AIA to trample on the weak and the innocent, like the present plaintiff, and to take away her livelihood in a split second with total impunity. Mr Ong Chee Yong rightly submitted that AIA's conduct and behaviour were both outrageous and unjustifiable. In a strong undertone, Mr Ong Chee Yong submitted further

that in resorting to cl 26(b) of the agent's contract, AIA was essentially saying that no matter how outrageous, how unjustifiable, how unreasonable, how shocking and how dastardly their conduct may be, the law cannot give relief to the innocent because cl 26(b) of the agent's contract permitted AIA to be outrageous, unjust, unreasonable and dastardly as they wish to be.

All said and done, the termination of the plaintiff's agent's contract was certainly unprecedented. In terminating the plaintiff's agent's contract, AIA failed to take into consideration the plaintiff's moral right to be treated as an individual with all her attendant rights and privileges. AIA failed to consider and attach due weight to the plaintiff's diligence, perseverance and excellent performance record in her profession. To AIA, it did not matter at all that the plaintiff had done no wrong, had broken no law and had offended no one. It seemed to me that the plaintiff's only crime as far as this case was concerned was the fact that she married the wrong man. AIA wanted to dismiss Soh Chor Ann and they also conveniently dismissed the plaintiff. This prompted Mr Ong Chee Yong to submit along these lines: that AIA, born and bred in the United States of America, that great champion and bastion of human rights, would perpetrate such an unjust deed on an innocent person like the present plaintiff. Mr Ong Chee Yong continued in serious view and this was what he said through his submission:

> It was not enough for the defendant that the husband's career be snuffed out, they wanted to make sure that the wife's career too would be extinguished. Having pronounced the death sentence on the husband's agency contract, they wanted also to see the wife's agency contract immolated on the funeral pyre of her husband's career.

Mr Firoz Hussein bin Ahmad Jamaluddin argued that the plaintiff had not adduced any evidence of conduct which would estop AIA from relying on cl 26(b) of the agent's contract. On the contrary, thus far the evidence showed the following state of affairs:

(1) the plaintiff was an innocent party;

(2) the plaintiff's agent's contract was terminated for the sole reason of her being married to Soh Chor Ann;

(3) the plaintiff was deprived of an opportunity of explaining why her contract should not be terminated;

(4) the timing of the termination was done in bad taste; it suggested cruelty or malice; it suggested that AIA had acted rashly in instructing that the letter of termination be sent out just before Chinese New Year;

(5) that the defendant, AIA, is a large multinational corporation while the plaintiff is a mere ordinary Malaysian citizen earning an honest living;

(6) AIA terminated the plaintiff's agent's contract in the belief — a false delusion, that they did not have to answer to the plaintiff; and

(7) AIA terminated the plaintiff's agent's contract in the belief — again a false delusion, that they did not have to account for their action in a court of law.

A As demonstrated, the conduct of AIA subsequent to the termination of the plaintiff's agent's contract betrayed AIA's 'state of mind' prior to and at the time of the termination. All the authorities do not bar this court from appraising the conduct of AIA subsequent to the termination in order to determine whether estoppel can be activated or otherwise.

B I have no hesitation for the reasons adumbrated above, to apply vigorously the doctrine of estoppel by conduct in order to prevent AIA from resorting to cl 26(b) of the agent's contract. This was my judgment and I so hold accordingly.

C *The statement of agreed facts would bar AIA from relying on cl 26(b) of the agent's contract*

The statement of agreed facts in bundle 'C' stipulated the issues that existed between the parties, in particular para 6 (c) to para 6(e) thereof and these paragraphs were worded as follows:

D 6 (c) Sama ada surat penamatan tersebut yang bertarikh 26 Januari 1995 telah diberi dengan niat jahat (in bad faith) dan adalah tidak mengikut undang-undang, tidak adil, tidak patut, tidak saksama dan/atau melanggar kaedah-kaedah keadilan asasi (natural justice);

(d) Sama ada penamatan agent's contract bertarikh 27 February 1992 oleh Defendan adalah tanpa sebab yang cukup (without sufficient cause);

E (e) Sama ada defendan telah gagal memberi kepada Plaintif notis yang patut (reasonable notice) akan penamatan Agency Contract tersebut.

and clearly it was now incumbent on the court's part to examine the issues of bona fide, mala fide, fairness, justification, equity, natural justice, sufficient cause and reasonable notice. Once again, I need to refer to the case of *Mohamed Selan* and that case concerned the suspension of a remisier F from trading by his stockbroking company and cl 4 of the remisier's agreement was worded as follows:

> It is hereby agreed that the company may in its absolute discretion limit the volume of transactions of the remisier or to restrict in any manner, the remisier's trading whenever it deems fit to do so or to suspend the remisier G from trading at any time at its absolute discretion without assigning any reason whatsoever and to reinstate the remisier with conditions as the company deems fit.

and the court did not appear to have questioned the validity of the clause in question. But that does not mean that this court cannot examine and H impugn cl 26(b) of the agent's contract. Two distinct differences between a remisier and a life insurance agent must now be put forward:

(a) the remisier's clients follow the remisier and will lose nothing by taking their business to another stock broker whereas the holder of a life insurance policy will be at the losing end if he terminates his policy with the insurance company; and

I (b) the remisier receives his income from one-off commissions on transactions made whereas a life insurance agent receives commission and other benefits over a period of time.

On reflection, a notable distinction between *Mohamed Selan*'s case and the present case can easily be seen. It would be this. The case of *Mohamed Selan* deals with suspension of an agent whereas the present case revolves itself on the issues of revocation or renunciation of an agent's authority. In the former, the position of the agent remains intact whereas in the present case, the agent loses her job. *Mohamed Selan*'s case too did not consider ss 158–159 of the Contracts Act 1950.

It would be correct to say that the case of *Mohamed Selan* is authority for the following proposition: that notwithstanding the clause 'without assigning any reason whatsoever', a party suspending an agent's authority may 'intentionally or voluntarily abandon' the right not to give any reason and where he has given a reason, the court is entitled to examine that reason and decide whether on the reasons given, the principal's action to suspend the plaintiff's trading was justified under the circumstances.

In the present case, the scenario was different. AIA through their solicitors agreed on the issues between the parties, and thus AIA have abandoned their right, if they had one, not to assign any reason for their termination of the agent's contract. And since a reason was disclosed in court in the course of the trial, namely that the plaintiff's agent's contract was terminated for the sole reason of her being married to Soh Chor Ann, the court was therefore entitled to examine that reason and decide accordingly in particular whether on the reason given, AIA's action to terminate was fair, justified, equitable or for sufficient cause.

Since AIA was the initiator, the one who terminated the plaintiff's agent's contract, it was therefore incumbent on them, based on the statement of agreed facts to show that the termination of the agent's contract was justifiable, was made in good faith, was made in accordance to law, was fair and equitable, was in accordance with natural justice and was with sufficient cause and reasonable notice. But alas, in the face of the formidable obstacles AIA did not consider it important and in fact did not call RJ Barth to the stand to give evidence. Neither did AIA call Lee Chin Leong, the Director of Agency, to the stand to testify. Lim Boon Kwee who was responsible for the termination letter as seen at p 2 of bundle marked 'B' was also not called to give evidence. In short, the persons who would know the real reason for the termination of the plaintiff's agent's contract were not called at all to give evidence in court. The legal burden was on AIA to prove that the termination was justified, was made in good faith, was in accordance to law, was equitable, was in accordance with natural justice and with sufficient cause and reasonable notice. Section 106 of the Evidence Act 1950 enacts as follows:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

and AIA had the onus to discharge which they miserably failed to discharge. On the meaning to be attached to the word 'especially', reference to the case of *PP v Lim Kwai Thean* [1959] MLJ 179 should be made.

Even if AIA could rely on cl 26(b) of the agent's contract, that clause has since been varied or modified by the addendum to the agent's contract dated 8 March 1994

I have alluded to and reproduced cl 26(b) of the agent's contract in the early part of this judgment and it would now be appropriate to reproduce the addendum to the agent's contract dated 8 March 1994 as seen in exh (P4) and it was worded as follows:

> AMERICAN INTERNATIONAL ASSURANCE CO LTD ADDENDUM TO AGENT'S CONTRACT
>
> Effective 1 December 1993
>
> If the Agent after terminating the Agent's Contract which he previously held with another Life Insurance Company hereinafter called 'the previous Insurer') joins or had joined the Company, the Agent shall not within two (2) years from the termination date of his previous contract, divert to the Company any policy issued by the previous insurer. If the Agent commits a breach of this condition, the Company shall terminate the Agent's contract.
>
> Dated this 8TH day of MARCH 1994
>
> Sgd (Illegible)
>
> Signature on behalf of the Company
>
> Sgd (Illegible)
>
> Signature of Agent
>
> Name (in block letters)
>
> KOH YEN BEE
>
> ...
>
> Perakuan di bawah Sek 48
> Akta Setem 1949
> Disetem di bawah Seksyen 47A(1)
> Penalti sebanyak RM2
> Dijelaskan/diremitkan sepenuhnya
> Sgd (Illegible)
> B/p Timb. Pemugut Duit Setem, Caw. Johor Bahru,.
> LHDN/J-01/2/42/96-149 ... 6/3/98.
> [AIA']

AIA held onto the notions that they need not give any reason for the termination of the plaintiff's agent's contract and that the addendum did not vary the agent's contract. The obvious differences between these two may be stated as follows:

(1) Clause 26 (b) of the agent's contract is not concerned with the question of whether the agent has breached any condition whereas the addendum permits termination upon the breach of a specified condition.

(2) Clause 26 (b) of the agent's contract permits termination without giving any reason whereas the addendum specifies the reason for the termination in question. A

Now, having perused through cl 26(b) of the agent's contract together with the addendum the following construction of these two documents may be advanced: B

(a) Clause 26 (b) of the agent's contract has been superceded by the addendum in the sense that termination by AIA of the agent's contract was only permissible when the agent has committed a breach of the condition as stated in the addendum. Put in another way, AIA may not terminate the agent's contract except for the breach of the condition as stated in the addendum. C

(b) Clause 26 (b) of the agent's contract allows termination by AIA for all the reasons except the reason as stated in the addendum; and by way of a correlation when cl 26(b) of the agent's contract applies, no reason needs to be given for the termination but where termination is governed by the addendum then the reason must be stated therein. D

(c) While cl 26(b) of the agent's contract permits AIA to terminate the agent's contract for any reason whatsoever, the scenario would be different under the addendum because termination under the addendum would be upon breach of a specified condition. E

(d) Clause 26 (b) of the agent's contract is not superceded nor modified by the addendum. Looking at this angle, the addendum may be construed as superfluous to cl 26(b) of the agent's contract or, alternatively, as being executed 'ex abundante cautela'. Applying this argument, cl 26(b) of the agent's contract would be considered as all encompassing so that it will cover the kind of situation as envisaged in the addendum. F

These varied constructions showed the ambiguities in construing cl 26(b) of the agent's contract with that of the addendum. Applying the contra proferentum rule, these ambiguities should be resolved in favour of the plaintiff. In my judgment, AIA must assign a reason for the termination of the plaintiff's agent's contract. Since AIA failed to assign a reason when terminating the plaintiff, there was thus wrongful termination of the plaintiff's agent's contract. In *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 (PC), Lord Brightman observed at p 88 of the report: G H

> There is a principle of construction that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

It is interesting to note that the then Federal Court in the case of *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, vigorously applied the contra proferentum rule in an insurance policy in favour of the assured. I

A *Clause 26 (b) of the agent's contract is void as it is inconsistent with ss 158 and 159 of the Contracts Act 1950*

There is a need to reproduce ss 158 and 159 of the Contracts Act 1950, and I will now do so accordingly:

B 158 Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

159 Reasonable notice must be given of such revocation or renunciation; C otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

and it goes without saying that cl 26(b) of the agent's contract which does not require the giving of any reason for the termination of the agent's contract is inconsistent with s 158 of the Contracts Act 1950 which requires D sufficient cause for revocation or renunciation of the agency. Furthermore, cl 26(b) of the agent's contract which requires the giving of only 15 days notice in writing for the termination of the termination of the agent's contract is also inconsistent with s 159 of the Contracts Act 1950 which specifically mandates the giving of reasonable notice.

It must be recalled that the agent's contract was dated 27 February E 1992 and it continued for three years until it was purportedly terminated by the letter dated 26 January 1995 pursuant to cl 26(b) of the agent's contract. Applying s 158 of the Contracts Act 1950 that agent's contract 'should be continued for (a) period of time.' Both ss 158 and 159 of the Contracts Act 1950 would apply and AIA must compensate the plaintiff for F the revocation or renunciation without sufficient cause. AIA too must make good the damage resulting to the plaintiff where reasonable notice of revocation or renunciation was not given.

It is interesting to note that unlike s 155 of the Contracts Act 1950 which has the qualification of the words: '... in the absence of an express contract ....', and s 183 of the Contracts Act 1950 which is governed and G qualified by the words: 'In the absence of any contract to that effect ...', there are no qualifying words in both ss 158 and 159 of the Contracts Act 1950. This suggests that the protection afforded by these provisions may not be taken away by private contract. At any rate, there is no clause at all in the agent's contract that expressly remove the applicability of both ss 158 H and 159 of the Contracts Act 1950.

If it was argued that by the agent's contract dated 27 February 1992, the parties have contracted out of the Contracts Act 1950, then I must at once respond and say that there is nothing in the agent's contract that provides that the parties waive all their rights inconsistent with the agreement thereto. This would certainly be in sharp contrast to the case of I *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) where there was such a clause in the form of cl 16 and Raja Azlan Shah CJ (Malaya) (as His Majesty then was) held that equity in that case favoured the bank. Here,

equity would certainly lean in favour of the plaintiff. Lord Hailsham in *Johnson & Anor v Moreton* [1978] 3 All ER 37 at p 49 of the report, aptly said:

> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line a).
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament — as was attempted here — where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. (line d onwards).

Incidentally, in the case of *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (FC), the then Federal Court held that a clause in the agreement which was inconsistent with the Housing Developers (Control and Licensing) Rule 1970 was void. Fortunately, cl 37 of the agent's contract reads as follows:

> This Agreement shall be construed and governed by the laws in force in Malaysia.

and it would be apparent that both parties by mutual agreement bring into sharp focus the application of ss 158 and 159 of the Contracts Act 1950. This was my judgment and I so hold accordingly.

Quantum

At para 12 of the statement of claim as seen in bundle marked 'A' the plaintiff averred as follows:

> By reason of the Defendant's wrongful termination of the said agent's contract, the plaintiff has suffered loss and damage and has been deprived of her rights, privileges and benefits contained in the agent's contract dated the 27 February 1992.

and I will now endeavour to examine them in some detail.

Compensatory damages

(a) Loss of earnings

There was evidence to show that at the time of the wrongful termination, the plaintiff was about 39½ years old and she was born on 29 July 1955 (see p 21 of the notes of evidence). Had she not been terminated she would have been able to work right up to the ripe old age of 65. She was earning an income of approximately RM8,100 per month at the time of her termination. She even expected an increase of income of 10% every year. At p 19 of the notes of evidence she testified as follows:

> Page 55 of bundle 'B' is a return of income for the company (AIA) ended year 1994 and it refers to the Statement of what I had earned. My income was RM97,684.21 sen.

(Witness still cries)
This works out to be RM8,100 plus per month and I was earning this figure at that time.

At p 24 of the notes of evidence, the plaintiff continued to testify:

As an insurance agent there is no retirement age. So long as your health permits you can continue to be an insurance agent.

Had I not been terminated I would have expected, definitely, an increase in my salary. My basis for saying this would be because I would still be soliciting for business and on top of that I would accumulate my renewal commission, career benefit and provident fund will also be increased. When my husband joined AIA I assigned my benefits for 3 years to my husband and had I continued till today I would still be able to assign my benefits to my children or if not my children I could assign to my relatives. As I grow older as an insurance agent things would have grown better.

In 1994 I was earning RM97,000 pa and my projected salary for the year 1995 would be RM107,000 approximately pa. An increase of 10% every year.

The plaintiff was a hardworking insurance agent. Very resourceful and full of initiative. The actual income earned by her would totally be dependent on her industry. The diligence and effectiveness of the plaintiff as an insurance agent can never be doubted — it was not questioned and it was not an issue. When the plaintiff took the stand, her evidence in regard to her commitment to her work and her ability to produce results remained intact. There was evidence to show that the plaintiff was a member of the elite Million Dollar Club for several years and she was one of the top five agents in Johor Bahru at the material time. She could have gone far. The sky's the limit and it was certainly within sight. There was every reason to believe that her earning power would multiply year by year in quick succession.

In the statement of claim at bundle marked 'A' at p 11 thereof, the plaintiff averred as follows:

PARTICULARS OF LOSS

(a) Loss of earnings (ie being total of First Year Commission, Renewal Commission, Direct Production Incentive, Persistency Incentive, Clerical Incentive) from 1995 until age 65 years, Calculated as follows:

Year	*Amount*
1995	RM100,000
1996	RM120,000
1997	RM140,000
1998	RM160,000
1999	RM180,000
2000	RM200,000
2001	RM220,000
2002	RM240,000
2003	RM260,000
2004	RM280,000
2005	RM300,000
2006	RM320,000
2007	RM340,000
2008	RM360,000
2009	RM380,000

2010		RM400,000
2011		RM420,000
2012		RM440,000
2013		RM460,000
2014		RM480,000
2015		RM500,000
2016		RM520,000
2017		RM540,000
2018		RM560,000
2019		RM580,000
2020		RM600,000
2021		RM620,000
	TOTAL	RM9,720,000

But Mr Ong Chee Yong quantified the loss of earnings from 1995 until the plaintiff reaches the age of 65 years, calculated on a projected increase of income at 10% pa as follows:

Year	*Amount*
1995	RM 100,000
1996	RM 110,000
1997	RM 121,000
1998	RM 132,000
1999	RM 145,000
2000	RM 160,000
2001	RM 176,000
2002	RM 193,000
2003	RM 212,000
2004	RM 233,000
2005	RM 256,000
2006	RM 282,000
2007	RM 310,000
2008	RM 341,000
2009	RM 375,000
2010	RM 412,000
2011	RM 454,000
2012	RM 500,000
2013	RM 550,000
2014	RM 605,000
2015	RM 665,000
2016	RM 732,000
2017	RM 805,000
2018	RM 886,000
2019	RM 974,000
2020	RM 1,072,000
2021	RM 11,979,000
	RM 11,979,000

But alas the calculation that gave the figure of RM11,979,000 was not pleaded and there were no attempts to amend the statement of claim at all. Cotton LJ in *Philipps v Phillips* 4 QBD 127 p 139 aptly said:

> In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

In *Farrell v Secretary of State for Defence* [1980] 1 WLR 172 at p 180, Lord Edmund Davies rightly observed:

> For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

That being the legal position, I am now constrained only to rely on what was pleaded in the statement of claim in so far as the loss of earnings was concerned.

It would not be appropriate to ignore the evidence of the plaintiff entirely. She said that she was earning RM8,100 per month and that there would be an increase of 10% every year. Thus, using the figure of RM8,900 times 12 months equals RM106,800. In 1995, the plaintiff was 39 years old and it would be in the year 2021 when she reaches 65 years of age and it would give a colossal figure of RM11,979,000 and if that is the figure which the plaintiff seeks, then every individual should become an insurance agent. But it is not easy to sell an insurance to a customer. Perseverance would be stretched to its limit.

I must take into account the following salient factors in order to arrive at a reasonable and fair quantum for loss of earnings:

(1) Recession: There was recession throughout the country between 1997 until 1999 and the year 2000 seems to be undergoing smooth transition. It would be extremely difficult to sell insurance during the recession period. This would invariably reduce the income of the plaintiff. The evidence thus far adduced showed an increase in the income that was purportedly due to the plaintiff. Given the resourcefulness of the plaintiff she might be able to sell insurance during the recession period bearing in mind that she was once a million dollar club certificate holder. However, it would be a matter of pure conjecture whether she could really do so. To be fair to the plaintiff, she did say under cross-examination at p 30 of the notes of evidence: 'At the present economic crisis had I been employed my commission would be bigger. The clients would be afraid of the future and they will buy more insurance coverages.' Indeed, this was a piece of encouraging news. At any rate, I take judicial notice that no one wants to buy a life insurance coverage during the recession as it would be better to use the money to buy food and other daily necessities.

(2) Old age: This would be a factor that will definitely slow the plaintiff's pace in selling insurance. The plaintiff would be less active. Selling insurance is like selling a piece of empty paper; an agent needs to work hard to push the margin of sales.

(3) Not to the decimal point: The calculations that appeared in the statement of claim were based on rough estimates and it was on the high side. It was not calculated to the decimal point. Even the calculations by Mr Ong Chee Yong in the course of his submissions suffered from the same fate.

(4) Failure to mitigate the loss: In examination-in-chief, at pp 23–24 of the notes of evidence, the plaintiff testified as follows: A

> I am currently a housewife and after termination of my services with AIA by AIA I did not join other insurance company because I was too disappointed, too disheartened, too sad to start all over again. I was with AIA for more than ten years before the termination. B

At p 25 of the notes of evidence, under examination-in-chief, the plaintiff had this to say:

> After my termination I did not go out to look for other jobs. I heard of jobs being available like clerical work or secretarial work. I am not qualified to do that kind of job. Clerical work would entail a salary of RM1,000 while C secretarial work would entail more than RM1,000.

Under cross-examination, the plaintiff testified as follows (see p 30 of the notes of evidence):

> I was so disheartened. I did not seek employment in other insurance companies and I could seek employment with other insurance companies. But D the other insurance companies may doubt my termination by AIA. They would put a question mark on it.

Under re-examination, this was what the plaintiff said at pp 30–31 of the notes of evidence:

> I didn't look for other job as an insurance agent because I would have a E question mark on my face. People would say that there must be something wrong with me, AIA have terminated me for no reason. My reputation was at stake.

In a nutshell, the termination was badly received by the plaintiff. She could have sought employment with other insurance companies but she decided F against it as there was a question mark as to her integrity. She too could have taken up clerical or secretarial works that gave low salaries but she refused to do so as she was not qualified to do those jobs. So she decided to stay at home and be a plain housewife. In my judgment, it was by design and purely out of her own choice that she decided to be a homebody. She could still put her expertise as an insurance agent into motion by working for another G insurance company and if her termination with AIA were questioned she could simply explain that she had filed a civil suit against AIA for wrongfully terminating her agent's contract. That would surely put an end to her critics.

We have just entered the year 2000. The future is so uncertain. To say H that the plaintiff would continuously earn RM8,100 per month as an insurance agent with AIA until the year 2021 when she reaches 65 had her agent's contract not been terminated would be entering into the realm of the unknown. No human being can predict the future. The forecast as to the plaintiff's future incomes were mere estimates that would be dependent on the economic situation of the country. Bearing in mind the factors which I I had referred to and the economic uncertainties that lie ahead, the loss of earnings at RM9,720,000 as stated in the statement of claim at p 11 of

bundle 'A' must be drastically reduced to reflect the realities of the matter. Deductions of 69% to 70% must accordingly be made notwithstanding the plaintiff's good track record as an insurance agent. The end result would reveal a figure of RM3m and that would, in my judgment, be a reasonable and fair assessment of the loss of earnings which the plaintiff would have incurred and I so ordered accordingly. For AIA, this amount must be a mere drop in the ocean.

(b) Loss of Agents Provident Fund

The statement of claim showed the following recitals under this head:

- as at 31st January 1995 ... RM4,936.57
- from 1st February 1996 and continuing, say ... RM300,000

and at p 138 of the notes of evidence the following piece of evidence emerged:

> Only the company contributes to the Agent's Provident Fund as provided for in rule 9 of D7. The agent do not contribute to the Agent's Provident Fund.

D7 is the Rules for AIA Malaysian Agents Provident Fund and rule 9 states as follows:

> COMPANY'S CONTRIBUTION
>
> 9 The Company will at the end of each month pay to the Fund:(a) An amount equal to the service commission which would have been paid to a Member on premiums payable during the 7th through the 10th policy years inclusive in respect of Life and Endowment Plans of insurance with premiums payable for not less than ten years written by him, if his agent's contract had entitled him to such a service commission, and such commission shall be calculated at the same rate as the service commission for the 6th policy year of such insurance under his agent's contract; and(b) One and one-half percent (1½%) of the premium payable during the 7th through the 10th policy years inclusive received by the Company in respect of Life and Endowment Plans of insurance with premiums payable for not less than ten years on policies written by persons other than the Member and assigned to him for servicing; and (c) One and one-half percent (1½%) of the premium payable during the 11th through the 15th policy years inclusive received by the Company in respect of Life and Endowment Plans of insurance with premium payable for more than 10 years written by him; and (d) Three percent (3%) of the premium payable subsequent to the 15th policy year received by the Company in respect of Life and Endowment Plans of insurance with premiums payable for more than 15 years written by him;
>
> which payments the Trustees shall credit to the accounts of the respective Members. The Company's such contribution shall continue as long as the Member's Agent's contract remains in force and effect, irrespective of the Member's age, and shall not belong to or be deemed the property of the Member until he is entitled to payment thereof in accordance with these Rules.

and since the plaintiff was prematurely terminated, she had lost out on the contributions that would have been hers if she had not been terminated by

AIA in the prime of her career. The AIA Agent's Statement at p 44 of bundle 'B' showed that as at 31 January 1995, the amount standing to the plaintiff's account in the Agents Provident Fund stood at RM4,936.57.

In her examination-in-chief, the plaintiff categorically stated as seen at p 12 of the notes of evidence that:

> After transferring all my cases to my husband, I actually started in 1987 at level zero.

This meant that the sum of RM4,936.57 represented the amount contributed by AIA for the period 1987 to 1994 — a span of seven years. On the basis that the plaintiff could work until the age of 65, her loss in terms of agents provident fund contributions would be according to the following calculations:

65 minus $39^1/_2$ over 7 times RM 4,936.57 equals RM20,804.17.

The sum of RM20,804.17 would be the plaintiff's loss of agents provident fund and that would be the amount which the plaintiff was entitled to and I so ordered accordingly.

Exemplary damages

In the statement of claim under the head of consequential relief, the plaintiff sought for at prayer (2) the following:

> the defendant do pay to the plaintiff damages.

and the words or the phrase 'exemplary damages' were not employed at all. In sharp contrast would be the case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 where the reliefs prayed for by the plaintiffs in that case were for aggravated and exemplary damages for trespass and nuisance, with interest thereon, together with a permanent injunction restraining all the defendants whether by themselves or their servants and/or agents or otherwise howsoever from entering, trespassing and/or carrying out works on the plot concerned on which were situated the dwelling houses and the vegetable, and costs. In the present case, the plaintiff did not employ the crucial words 'aggravated and exemplary damages' but instead employed the word 'damages'. In the present case too the plaintiff apart from claiming for loss of earnings and loss of Agents Provident Fund which were alluded to earlier, also claimed against AIA for a declaration that the termination by AIA of the agent's contract dated the 27 February 1992 was unlawful.

Edgar Joseph Jr SCJ sitting in the High Court in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* had this to say of 'exemplary damages' especially at pp 422–423 of the report.

> In a famous passage in his judgment in *Rookes v Barnard* [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, Lord Devlin, with the unanimous approval of all his brethren, reviewed the law and laid down that exemplary damages could only be awarded in three categories of cases; namely, oppressive action by officers of the Crown; secondly, cases where 'a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to

be made out of his wrongdoing will probably exceed the damages at risk'; and thirdly, where statute expressly authorized it.

In addition, Lord Devlin went further and spelt out three 'considerations' applicable to all cases of exemplary damages: first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'; secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the House might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries; and thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages.

The fact that exemplary and compensatory damages must thus be presented differently to the jury, Lord Devlin also indicated, did not necessarily mean that the jury must make two separate awards. It should, however, be directed that exemplary damages should only come into play if it regards the amount which it has fixed for compensation as inadequate in the circumstances to punish and deter the defendant and mark its disapproval for his conduct.

In *Cassell & Co Ltd v Broome*, [1972] 1 All ER 801; [1972] AC 1027; [1972] 2 WLR 645, Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard*. This was how he put it at p 843:

> 'There may be exemplary damages if a defendant has formed and been guided by the view that though he may have to pay some damages or compensation because of what he intends to do yet he will in some way gain (for the category is not confined to money-making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.'

and I need to emphasize his Lordship's words when his Lordship said that 'exemplary damages should only come into play if it regards the amount which it has fixed for compensation as inadequate in the circumstances to punish and deter the defendant and mark its disapproval for his conduct.' Be that as it may, Mr Ong Chee Yong argued that AIA had deliberately terminated the plaintiff's agent's contract in reliance of cl 26(b) of the Agent' Contract and AIA had within their contemplation the dire consequences of that termination but was fortified in pursuing the matter because their past experience had convinced them that aggrieved agents were too meek to pursue the matter further. The evidence of Yee tell a harrowing tale (see pp 67–68 of the notes of evidence):

> One month my department issued about 120 of such termination notices relying on cl 26(b). So far all of them have been very docile,

AIA certainly met its match in the person of the plaintiff.

Without a doubt, AIA had considered the possibility of legal suits

brought against it but had nevertheless deliberately proceeded with their action. It remained as a total mystery as to who was responsible in scribbling the plaintiff's name on the memorandum dated 26 January 1995 and marked as exh P5 which was worded as follows:

> AMERICAN INTERNATIONAL ASSURANCE CO LTD
> MEMORANDUM
>
> To: BK Lim
>
> From: VP-Director of Agencies Malaysia
>
> Date: January 26, 1995
>
> Re: SOH CHOR ANN — JB/SOH
>
> Code No: 1810-35803 & Koh Yen Bee 1810
>
> RJB met with me on the above leader and we agreed to terminate him for gross misconduct and abuse.
>
> Please terminate using the 15 or 21 days notice.
>
> Regards,
>
> Sgd (Illegible)
>
> LEE CHIN LEONG
> cc: Mr R J Barth
> Mr Edmund Ng
> AIA CO LTD
> 26 JAN 1995
> RECEIVED
> AGENCY
> RECORDS
> DEPARTMENT

and the 'scribbler' that added the plaintiff's name in handwritten form did not come to court to explain the scribbling. As an employee of AIA, the 'scribbler' must be acting for AIA and AIA must be held responsible and accountable for it.

It was clear beyond peradventure, that there was a cynical disregard on the part of AIA in regard to the plaintiff's rights. AIA was under an expectation that the plaintiff would remain docile like the other victims upon being terminated. AIA was certainly wrong.

It must be recalled that following the termination, the plaintiff was left in a complete financial wreck. In the words of the plaintiff, the day she received the termination letter was 'the saddest Chinese New Year' for her (see p 18 of the notes of evidence). The plaintiff's monthly income from RM8,100 per month had suddenly plummeted to zero. It was the same for her husband who, once upon a time, was earning between RM9,000 to RM10,000 per month had to experience an empty pocket — devoid of financial means and resources (see p 61 of the notes of evidence). By the stroke of a pen, AIA had succeeded in destroying the careers of both the plaintiff and her husband. AIA too had succeeded in demoralising both of them to such an extent that they decided not to return to the insurance industry at all. As I said, the plaintiff could had she wanted to join some

other insurance company, yet she chose to remain a housewife. We have the situation of where both the plaintiff and her husband had no more financial means to stay alive and fend for themselves and their two children. AIA, on the other hand, remained a financial giant oblivious of what they had done and must also be chuckling for joy at the thought of not only terminating Soh Chor Ann but also the plaintiff as well. On these salient grounds, Mr Ong Chee Yong submitted that the plaintiff was entitled to an award of exemplary damages.

If the present case was eminently suited for an award of exemplary damages, what then would be the appropriate sum to be awarded. In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors*, Edgar Joseph Jr SCJ said at p 427 of the report:

> In *Rookes v Barnard* [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, Lord Devlin expressed the view that awards of exemplary damages should be moderate and that the resources of the parties was a relevant consideration. It follows from this that a modest award would make no impact on a defendant who is well-off, while conversely, even a modest award could work a great hardship on a defendant of modest means.
>
> The other factors which must be taken into consideration is the quantum of the compensatory award (per Lord Devlin in *Rookes*' case at p 1218) as well as the conduct of the parties right down to the time of the judgment. (See *Praed v Graham* (1889) 24 QBD 53).

A modest award for exemplary damages would encourage AIA to think lowly of the Malaysian courts. In the United States of America — the place of origin of AIA, exemplary damages would run into billions. Our Malaysian courts are more reasonable and they are manned by right honourable legal personalities within the country. Malaysian judges act according to law and the failure of the plaintiff to adhere strictly to her statement of claim in claiming for 'exemplary damages' must be considered as fatal. The plaintiff merely prayed for 'damages' without elaborating that it was for 'exemplary damages'. To me, a claim for 'exemplary damages' would be a radical departure from the statement of claim (*Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764, 113 SJ 671). Mr Ong Chee Yong was quite persistent and he suggested that if the court were minded to grant exemplary damages it should be in the region of RM5m. It was an attractive and persuasive argument but as I said the plaintiff must abide by her pleadings. I refused to give exemplary damages to the plaintiff as it was a clear case of an omission of an averment which was essential to success. At any rate, the sum of RM3m for loss of earnings which I had ordered in favour of the plaintiff, would 'punish and deter' AIA and 'mark this court's disapproval of its conduct.

Conclusion

I declared that the termination by AIA of the plaintiff's agent's contract dated 27 February 1992 was unlawful. Without hesitation, I gave judgment to the plaintiff with costs. I too made the following orders in favour of the plaintiff:

(a) Loss of earnings: The plaintiff was entitled to RM3m and AIA must pay this amount forthwith to the plaintiff as she had suffered all these years while waiting for justice from this court.

(b) Loss of Agents Provident Fund: The plaintiff was rightly entitled to a sum of RM20,804.17 under this head and AIA must likewise forthwith pay this amount.

(c) AIA to pay the plaintiff interest on pre-trial damages at 8% pa from the date of termination, viz, 9 February 1995 until the date of judgment (see prayer (3) of the statement of claim that was amended orally on 3 March 1998).

(d) AIA to pay interest on the judgment sum at 8% pa from the date of judgment until the date of full payment thereof (see prayer (4) of the statement of claim that was amended orally on 3 March 1998).

I must record my indebtedness to Mr Ong Chee Yong and Mr Firoz Hussein bin Ahmad Jamaluddin who performed extremely well at the bar. Their painstaking efforts in conducting the trial should be applauded.

The trial proceeded smoothly to its final conclusion and at times interspersed with drama to add colour to it. Dato' Dominic Puthucheary too performed marvellously at the bar and his style was beyond reproach.

Plaintiff's application allowed.

Reported by Andrew Christopher Simon